No. 14-10154

IN THE

# Supreme Court of the United States

STEPHEN L. VOISINE AND
WILLIAM E. ARMSTRONG, III,

*Petitioners,*

*v.*

UNITED STATES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF *AMICI CURIAE* OF MAJOR CITIES CHIEFS AND THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS SUPPORTING RESPONDENT

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## STATEMENTS OF INTEREST[1]

### *Major Cities Chiefs*

The Major Cities Chiefs Association (MCCA) is a professional association of Chief police executives representing the largest cities in the United States, Canada and the UK. MCCA's membership comprises Chiefs and Sheriffs of the sixty-seven largest law enforcement agencies in the United States. It includes police executives heading the largest police departments in the United States, including Atlanta, Chicago, Dallas, Detroit, Los Angeles, New York, Philadelphia, Washington, D.C., and many others, which protect roughly 40% of America's population. The Major Cities Chiefs Association has filed amicus briefs in numerous cases, including *District of Columbia v. Heller* (No. 07-290, Supreme Court of the United States of America), *Moore v. Madigan* (No. 12-1269, 7th Circuit), *Woollard v. Sheridan* (No. 12-1437, 4th Circuit), *Drake v. Filko* (No. 12-1150, 3rd Circuit), and *United States v. Castleman*, (No. 12-1371, Supreme Court of the United States of America).

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[1] Pursuant to Supreme Court Rule 37.3(a), the *amici curiae* state that the parties have consented to the filing of this brief and letters of consent have been filed in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. *Amici curiae* further state that no one other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented.

*International Brotherhood of Police Officers*

The International Brotherhood of Police Officers (IBPO) is one of the largest police unions in the country, representing a significant number of members around the United States. While the IBPO fully supports and defends the Second Amendment right to keep and bear arms, it strongly supports reasonable federal and state gun laws that protect the public and law enforcement officers. The International Brotherhood of Police Officers filed an amicus brief in *United States v. Castleman*, (No. 12-1371, Supreme Court of the United States of America).

## SUMMARY OF THE ARGUMENT

The ruling of the First Circuit, if reversed, would frustrate the enforcement of 18 U.S.C. § 922(g)(9), which was enacted by Congress in response to the nationwide problem of firearms in the hands of domestic abusers. The First Circuit correctly recognized that in the unique context of domestic violence, recklessness fits within the meaning of 18 U.S.C. § 921(a)(33)(A)'s phrase "use or attempted use of physical force." This interpretation is consistent with Congressional intent, this Court's opinion in *United States v. Castleman*, 134 S. Ct. 1405 (2014), and public policy considerations.

Petitioners do not question the prevalence or the seriousness of domestic violence in this country. However, they seek to minimize the impact of reckless conduct and ignore the well-documented pattern by which a relatively minor engagement can rapidly escalate into a lethal one. The statistics speak for themselves. Over one million domestic

violence crimes occur every year in the United States. Domestic violence constituted 17% of total violent crimes in 2010 and at least half of intimate partner homicides in the United States are committed with firearms. The presence of a firearm dramatically increases the likelihood that an episode of domestic violence will result in death. Prosecution of offenders can be problematic, as victims are often unwilling to assist in prosecution of loved ones, or even deny violence on the part of the offender. A domestic abuser's conduct does not usually stop at a single incident, but can and does escalate into increasingly violent episodes. Thus, even if an initial act may be viewed as reckless, it more often than not acts as a precursor to significant acts of violence. In light of the difficulties in prosecuting domestic abusers and the repetitive nature of domestic abuse, the First Circuit's opinion limits the harm that can be inflicted by individuals who, through their own actions, expose their closest and most intimate family members to the threat of devastating injury and loss.

Not only the victims but also the law enforcement officers face grave danger from domestic abusers' access to firearms. Domestic abuse calls constitute the largest category of calls received by police departments each year. Approximately 14% of all police officer deaths occur during a response to domestic violence calls in a single year. Almost all of these officers are killed by a firearm.

The deaths of family members and law enforcement officers at the hands of domestic abusers impose great societal costs, ranging from direct costs, such as the costs of medical and mental health care,

to indirect costs including lost productivity and lost lifetime earnings.

Reversing the First Circuit's conclusion that the prohibition under Section 922(g)(9) extends to abusers who engage in reckless acts of domestic violence would undermine Congress' goal of combating domestic violence. Such a reversal would severely aggravate an already critical public safety crisis and increase the risk to the many victims of domestic abuse. For these reasons, the decision of the First Circuit should be affirmed.

## ARGUMENT

### I. Domestic Violence is a Widespread Crime Made More Lethal When Abusers Have Access to Firearms.

As this Court has recognized in *Castleman*, "[f]irearms and domestic strife are a potentially deadly combination[.]" *United States v. Castleman*, 134 S. Ct. 1405, 1408 (2014) (citing *United States v. Hayes*, 555 U.S. 415, 427 (2009)). This understanding has been repeatedly echoed in the Court's jurisprudence. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 117 (2006) ("[W]e recognize that domestic abuse is a serious problem in the United States."); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 892 (1992) ("Thirty percent of female homicide victims are killed by their male partners."); *see also Giles v. California*, 554 U.S. 353, 405 (2008) (Breyer, J., dissenting) ("Each year, domestic violence results in more than 1,500 deaths and more than 2 million injuries; it accounts for a substantial portion of all homicides; it typically involves a history of repeated violence; and it is

difficult to prove in court because the victim is generally reluctant or unable to testify.").

The statistics are sobering. According to the Department of Justice, an estimated 1.2 million to 1.5 million domestic violence crimes were committed each year between 2003 and 2012. Jennifer Truman et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Victimization 2012*, NCJ 243389 at Table 1 (Oct. 2013).[2] These numbers, if anything, understate the problem as many domestic violence crimes are never reported. *See, e.g.*, Timothy C. Hart & Callie Rennison, Bureau of Justice Statistics Special Report, U.S. Dep't of Justice, *Reporting Crime to the Police 1992-2000*, NCJ 195710 at 5 (Mar. 2003).[3] Although the overall violent crime rate has decreased, the number of intimate partner victimizations has remained stable since 2000. Shannan Catalano, Bureau of Justice Statistics, U.S. Dep't of Justice, *Intimate Partner Violence, 1993-2010*, NCJ 239203 at 1 (Nov. 2012).[4] Intimate partner violence has actually increased as a proportion of total violent crimes from 12.5% in 2000 to 17% in 2010. *Id.* at Appendix Table 1.

Access to firearms creates an additional layer of risk in this scenario. One study showed that firearms were used in about 32,900 incidents *each*

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[2] *Available at* http://www.bjs.gov/content/pub/pdf/cv12.pdf (last visited Jan. 24, 2016).

[3] *Available at* http://www.bjs.gov/content/pub/pdf/rcp00.pdf (last visited Jan. 24, 2016) (54% of violent and seriously violent crimes committed by intimate partners reported to police).

[4] *Available at* http://www.bjs.gov/content/pub/pdf/ipv9310.pdf (last visited Jan. 24, 2016).

*year* of nonfatal intimate partner violence victimizations from 2003 through 2012. *See* Jennifer L. Truman & Rachel E. Morgan, Bureau of Justice Statistics, U.S. Dep't of Justice, *Nonfatal Domestic Violence, 2003-2012*, NCJ 244697 at Table 7 (April 2014). Further, the majority of intimate partner homicides in the United States are committed with firearms. *See, e.g.*, April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large U.S. Cities*, 16 Inj. Prev. 90, 90 (2010) (over 60% of intimate partner homicides are committed with firearms). Having one or more guns in the home makes it five times more likely that an episode of domestic violence will result in death. *Id.* Furthermore, domestic violence assaults involving guns are twelve times more likely to result in death than those involving other weapons or bodily force. New Yorkers Against Gun Violence, *Firearms and Domestic Violence*, at 1 (Mar. 2013).[5]

Many such deaths are preventable. Researchers have concluded that abusers who kill "with a firearm would be unable or unwilling to exert the greater physical or psychological effort required to kill with another, typically available weapon." Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3045 (1992). An analysis of every identifiable mass shooting between 2009 and 2013 found that in 57% of those incidents, the shooter

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[5] *Available at* http://nyagv.org/wp-content/uploads/2013/03/Firearms-and-Domestic-Violence-NYAGV.pdf (last visited Jan. 24, 2016).

killed a current or former intimate partner or other family member. Mayors Against Illegal Guns, *Analysis of Recent Mass Shootings* (September 2013), at 2, 4.[6] Over the past quarter century, more intimate partner homicides in the United States have been committed with guns than with all other weapons combined. Letter from Professor April M. Zeoli, School of Criminal Justice, Mich. State Univ., to Sens. Patrick J. Leahy & Charles Grassley, Chairman & Ranking Member of the U.S. Senate Comm. On the Judiciary (January 28, 2013).[7]

Domestic violence involving firearms is disproportionately skewed towards women. Women comprise the majority of victims of intimate partner violence, and homicide and the impact of firearms differs by gender. In 2013, 53% of female victims of intimate partner homicide were killed with firearms, while male victims came in at a distant 19%. *See* April M. Zeoli et al., *Risks and Targeted Interventions: Firearms in Intimate Partner Violence*, Epidemiological Rev. 1, 1 (2016) (citing data from the Federal Bureau of Investigation).[8] For male victims of intimate partner homicide, 40% were killed by firearms and 38% by knives. *Id.*

The need to address gun violence in domestic abuse situations is further borne out by the fact that

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[6] *Available at* http://libcloud.s3.amazonaws.com/9/56/4/1242/1/analysis-of-recent-mass-shootings.pdf (last visited January 24, 2016).

[7] *Available at* http://www.judiciary.senate.gov/imo/media/doc/013013RecordSub-Leahy.pdf (last visited Jan. 24, 2016).

[8] *Available at* http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/36124) (last visited Jan. 24, 2016).

women are almost four times more likely to be shot by a current or former intimate partner than by a stranger. Injury and Violence Prevention Program, Wash. St. Dep't of Health, *Firearm-Related Injury*, at 3 (Feb. 2013).[9] Although the number of homicides of women by strangers has decreased over time, the number of female homicides by intimate partners with firearms has increased. Susan B. Sorenson, *Firearm Use in Intimate Partner Violence*, 30 Evaluation Rev. 229, 232 (2006). In 2011, an average of 41 women were shot to death each month in the United States by current or former intimate partners. Violence Policy Center, *When Men Murder Women: An Analysis of 2011 Homicide Data* (Sept. 2013), at 6.[10] Alarmingly, women in the United States are eleven times more likely to be murdered with guns than women in other high-income countries. *See* Erin G. Richardson & David Hemenway, *Homicide, Suicide, and Unintentional Firearm Fatality: Comparing the United States with Other High-Income Countries, 2003*, 70 J. Trauma 238, 242 (2011).

Even in the absence of fatalities, guns are used by batterers to threaten, scare, coerce and intimidate their victims. One study found that 16 out of every 1,000 women in the United States have been threatened with a gun, and 7 in 1,000 women have had a gun used against them by an intimate partner. Sorenson, *supra*, at 235.

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[9] *Available at* http://www.doh.wa.gov/Portals/1/Documents/Pubs/970006Firearms.pdf (last visited Jan. 24, 2016).

[10] *Available at* http://www.vpc.org/studies/wmmw2013.pdf (last visited Jan. 24, 2016).

This form of domestic violence is associated with an increase in the risk of homicide. An abuser's previous threats with a weapon and previous threats to kill are associated with significantly higher risks for homicide. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Pub. Health 1089, 1092 (2003).[11]

This Court has repeatedly recognized the inherent risks to public safety when domestic abusers have access to firearms. *See United States v. Hayes*, 555 U.S. 415, 427 (2009) ("Firearms and domestic strife are a potentially deadly combination nationwide."); *see also District of Columbia v. Heller*, 554 U.S. 570, 711 (2008) (Breyer, J., dissenting) ("If a resident has a handgun in the home that he can use for self-defense, then he has a handgun in the home that he can use to commit suicide or engage in acts of domestic violence.").

Notwithstanding these grim statistics, laws and policies that prohibit batterers from obtaining access to firearms have reduced the rate of gun violence in domestic settings. According to an analysis of FBI data, 38% fewer women are shot to death by intimate partners in states that require a background check for every handgun sale. Mayors Against Illegal Guns, *Gun Laws and Violence Against Women* (citing U.S. Department of Justice, Federal Bureau of Investigation, Supplementary Homicide Reports,

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[11] *Available at* http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.93.7.1089 (last visited Jan. 24, 2016).

2010).[12] Other studies indicate that prohibiting violent misdemeanants from possessing guns is associated with a decrease in the risk of arrest for new firearm crimes and violent crimes. Garen J. Wintemute et al., *Subsequent Criminal Activity Among Violent Misdemeanants Who Seek to Purchase Handguns*, 285 JAMA 1019, 1026 (2002).

The social costs associated with injuries from firearms are significant. The total costs for all United States gunshot injuries sustained in 2010 alone has been $174 billion. *The Cost of Firearm Violence*, Children's Safety Network.[13] One 2003 study concluded that the costs of domestic violence exceed $5.8 billion annually, with a figure that includes nearly $4.1 billion in direct medical and mental health costs, and nearly $1.8 billion in indirect costs from lost productivity and lost lifetime earnings. Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *Costs of Intimate Partner Violence Against Women in the United States*, at 2 (2003).[14] These staggering figures do not take into account other costs such as criminal justice costs, wage losses, and the value of pain, suffering and lost quality of life.

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[12] *Available at* http://everytown.org/wp-content/uploads/2014/05/Gun_Laws_and_Violence_Against_Women.pdf (last visited Jan. 24, 2016).

[13] *Available at* http:// http://www.childrenssafetynetwork.org/sites/childrenssafetynetwork.org/files/TheCostofGunViolence.pdf (last visited Jan. 24, 2016).

[14] *Available at* http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf (last visited Jan. 24, 2016).

## II. Domestic Violence is Characterized by an Escalating Pattern of Abuse and a Prior Act of Violence is a Strong Predictor of Future Acts of Increased Aggression.

Domestic violence tends to follow an escalating pattern, which begins with threatening physical behavior and verbal abuse that eventually leads to increasing physical violence and, in some cases, death. One study estimated that the probability of future injury for a domestic violence victim who experienced no injury in a prior domestic violence incident (i.e., the probability of escalation of domestic abuse) was 83.7%. Alex R. Piquero et al., *Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization, Escalation, and De-Escalation Evidence from the Spouse Assault Replication Program*, 121 Pub. Health Rep. 409, 414 (2006). A landmark study across 11 cities by Johns Hopkins University showed that 70% of female homicide victims had been physically abused previously by the same intimate partner who ultimately killed them. *See* Campbell, *supra*, at 1091. In such a situation, where a prior act of violence, reckless or otherwise, is a predictor of future acts of greater violence in the same intimate setting, the prudent policy would be to deny the offender access to firearms. *See United States v. Lewitzke*, 176 F.3d 1022, 1027 (7th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3231 (U.S. Oct. 4, 1999) (No. 99-5677) ("[T]hose convicted of domestic violence offenses have already harmed their domestic partners in some fashion. It certainly would not be irrational for Congress to conclude that these

individuals pose the most acute danger of turning a gun on a family member.").

Domestic violence can take many forms and may start with violence that does not involve serious physical assault and injury. But studies show that abuse in a given domestic situation is not restricted to a particular form. Studies have also shown that violence is often preceded by emotionally controlling and verbally abusive behavior. *See* Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control and Prevention, *Extent, Nature, and Consequences of Intimate Partner Violence*, NCJ 181867, at 34-35 (Jul. 2000);[15] Kris Henning & Lisa M. Klesges, *Prevalence and Characteristics of Psychological Abuse Reported by Court-Involved Battered Women*, 18 J. Interpersonal Violence 857, 858 (Aug. 2003). Because even non-physical domestic abuse is a strong indicator of future physical abuse, including murder, there is a strong policy interest in keeping firearms out of the hands of all convicted domestic abusers, regardless of whether their initial use of violence was reckless or intentional.

## III. Law Enforcement Officers Face Ongoing, Intractable Risks When Domestic Abusers Have Access to Firearms

Crimes of domestic violence create unique dangers for responding officers. *See Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 186 (2004) ("Officers called to investigate domestic disputes need to know whom

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[15] *Available at* https://www.ncjrs.gov/pdffiles1/nij/181867.pdf (last visited Jan. 24, 2016).

they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim."); *see also Randolph*, 547 U.S. at 127 (Breyer, J., concurring) ("[L]aw enforcement officers must be able to respond effectively when confronted with the possibility of abuse.").

There are various reasons why domestic violence calls prove so fatal for officers, all of which counsel in favor of restricting firearm access for domestic abusers. As the Chairman and CEO of the National Law Enforcement Officers Memorial Fund explained:

> No assignment poses more uncertainty to a law enforcement professional than a domestic disturbance call. The circumstances are emotionally charged, and weapons, alcohol and drugs are often involved. An officer who responds as a peacekeeper often becomes a target of the violence.[16]

This combination of alcohol and drugs, emotional stress and weapons is often fatal to responding officers. According to a 2013 study of officer homicides that occurred responding to domestic violence calls, 27% of perpetrators were under the influence of drugs or alcohol at the time of the incident. Cassandra Kercher et al., *Homicides of*

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[16] Campus Safety, *Domestic Violence Takes a Heavy Toll on Law Enforcement Community*, Campus Safety Magazine (Oct. 8, 2007), *available at* http://www.campussafetymagazine.com/Channel/Mass-Notification/News/2007/10/09/Domestic-Violence-Takes-a-Heavy-Toll-on-Law-Enforcement-Community.aspx (last visited Jan. 24, 2016).

*Law Enforcement Officers Responding to Domestic Disturbance Calls*, 19 Inj. Prev. 331, 332 (2013). Drugs and alcohol may only heighten already-fraught situations, in which a domestic abuser may respond to a perceived loss of control by attacking his victim and/or responding officers. *See* Mark Wynn, *Officer Safety in Domestic Violence Responses*, The Police Chief 80 (Dec. 2013) 10-11. Finally, the presence of firearms in a residence multiplies the risk manyfold to responding officers, who may have no familiarity with the residence and are surprised by a weapon in the hands of a person already acting violently.

These risk assessments are borne out by data. According to a 2013 study, out of a total of 796 law enforcement officers killed between 1996 to 2010, 116 officers were killed while responding to domestic disturbance calls—nearly 15% of all law enforcement homicides during this time. Kercher, *supra*, at 332. Domestic disturbances were the third most common encounter resulting in law enforcement homicide. *Id.* Nearly half of the 116 officers killed were responding to intimate partner violence calls. *Id.* at 335. Moreover, the study concluded that domestic abusers posed a grave risk not only to law enforcement officers while responding to domestic violence calls, but also to their victims. *Id.* at 334. A larger portion of the victims of domestic violence were killed alongside responding officers (21%) compared to other domestic disturbance related calls. *Id.*

Almost all of these officers (94%) were killed by a firearm. *Id.* The study revealed that officers were more likely to be shot during a domestic disturbance call by a long barreled gun than in all other

encounters (46% versus 22%), which is consistent with the high proportion of perpetrators either ambushing the officer often before he or she can enter the residence (40%), barricading themselves in the home to prevent arrest (15%) or struggling with the officer to resist arrest (30%). *Id.* at 333. The study also demonstrated that body armor and backup assistance provide limited assistance in such situations. Although the use of body armor can increase the chance an officer would survive gunfire, body armor will not prevent a fatal shot to another part of the body, as shown by the finding that approximately 67% of the officers studied were wearing body armor when killed, that 52% were killed through gunshot wounds to the head/neck, where body armor provided little to no protection, and that 34% died on the scene. *Id.* at 332. Similarly, the study revealed that when an officer worked with a partner or had backup present, the likelihood of more than one officer being injured or killed was actually significantly greater for domestic disturbances than for other encounters. *Id.* at 334.

Mark Wynn, a faculty member with ICAP's National Law Enforcement Leadership Initiative on Violence Against Women, acknowledged this trend in his article for Police Chief Magazine, writing:

> With increasing frequency, it's not just a single officer but multiple officers who are killed. In Birmingham Alabama, three were killed; Pittsburgh Pennsylvania, three more; in Pleasanton and Odessa Texas, six total fellow officers were gunned

> down. All these officers were responding to domestic violence calls. Most often the weapon of choice is the high-power, high-capacity rifle which can defeat normal patrol armor.

Wynn, *supra*.

The numbers bear out the reality of police fatalities and at least 21 officers have been shot and killed while investigating domestic violence according to statistics compiled by the National Law Enforcement Officer's Memorial Fund. The frequency of domestic violence calls is not going to change. As this Court has acknowledged, "[f]amily disturbance calls . . . constitute the largest single category of calls received by police departments each year." *Randolph*, 547 U.S. at 126 (Breyer, J., concurring) (quoting Helen J. Mederer & Richard J. Gelles, *Compassion or Control: Intervention in Cases of Wife Abuse*, 4 J. Interpersonal Violence 25 (1989)). In the United States, between 473,000 and 628,000 incidents of intimate partner violence and between 166,000 and 294,000 incidents of violence involving other family members were reported to the police annually. Kercher, *supra*, at 331.

These circumstances require police departments and other law enforcement and first responder agencies to devote significant taxpayer resources to combat the problem. Nationally, 15% to 40% of all calls for police assistance are related to domestic violence incidents. Michael G. Breci, *Police Response to Domestic Violence, in Crisis Intervention in Criminal Justice/Social Service* 102, 102 (4th ed.

2006). Other costs include "hazardous duty pay, early retirement programs, use of bulletproof vests, and specialized training in backup assistance and weapon retention." J. David Hirschel et al., *The Relative Contribution of Domestic Violence to Assault and Injury of Police Officers*, 11 Justice Quarterly 99, 115 (1994).

Petitioners' narrow reading of the term "use" heightens the risks that police officers face every day by permitting convicted domestic violence offenders to have access to firearms, in contradiction of Congress' "manifest purpose" of closing a dangerous loophole in the federal firearms legislation. *See Hayes*, 555 U.S. at 426-27. Accordingly, the First Circuit's decision should be affirmed.

## IV Prosecuting Domestic Violence is Challenging and Perpetrators May Avoid Conviction

Petitioners' assert that the availability of mandatory arrest requirements and no-drop rules have swept individuals whose "conduct is minor or unclear" into the criminal justice system and unfairly dubbed them as domestic violence offenders. *See* Pet. Br. 27. Petitioners' thus urge a narrow reading of the statute to avoid disenfranchising vulnerable groups who may have pled guilty be misdemeanors because of lack of access to adequate legal advice. *Id.* at 29-30.

This is not an accurate representation of the reality. Prosecuting domestic abuse is challenging. *See, e.g., United States v. Tooley*, 717 F. Supp. 2d 580, 594 (S.D. W. Va. 2010) (noting that the Lautenberg Amendment, which added Section 922(g)

"was based on the recognition that, because of the difficulty in proving felony domestic violence charges, [this] particular crime was often under-charged or under-pled, and domestic violence consistent with the elements of a felony frequently resulted only in a misdemeanor plea or conviction").[17] Victims often refuse to cooperate and perpetrators may be further inflamed by police or state intervention, and escalate their violent conduct. *Stimmel v. Lynch*, 2015 U.S. Dist. LEXIS 130132, at *9 (N.D. Ohio Sept. 28, 2015) (internal citations omitted) ("Prosecutors face two major obstacles to obtaining felony convictions: some family members are willing to forgive the aggressors in order to restore harmonious relations, while others are so terrified that they doubt the ability of police to protect their safety."). In some cases, mandatory arrest and "no drop" rules puts law enforcement in a no-win situation. These rules were put in place for protection of the victim, but the victim may not be willing to cooperate to allow these mechanisms to act. Even if arrest and prosecution follows, there is a risk that the perpetrator may be further to inflamed by law enforcement activities and take the anger out on victim, and law enforcement officers seeking to protect the victim.

The following news story, *Tangled Emotions Make Domestic Violence Cases Hard to Stop, Prosecute* by Tyler Jett,[18] illustrates how the cycle of arrest,

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[17] *Tooley* also highlighted the problem with, "[o]udated or ineffective laws often treat domestic violence as a lesser offense." 717 F. Supp. 2d at 594-95.

[18] Tyler Jett, *Tangled Emotions Make Domestic Violence Cases Hard to Stop, Prosecute*, Chattanooga Times Free Press (Oct. 19,

denial, and violence repeats with perpetrator being arrested, released because of lack of cooperation and escalating conduct until there is a fatality:

> Between the morning that the judge let him walk away and the night the police shot him, Christopher Andrew Shell changed.
>
> Sabrina Bloodworth, his girlfriend of 10 years, said Shell talked about his own death after his first domestic violence charges were dropped, about an ending he expected to arrive soon. He showed Bloodworth his tools, told her the price of each hammer and drill. He seemed sick, but she can't explain why.
>
> "When I die," she remembers him saying, "sell these. Support yourself."
>
> Then, on Sept. 27, Bloodworth ran across Cochran Drive to her cousin's house, away from Shell. Walker County Sheriff Steve Wilson says Bloodworth reported her boyfriend beat her so severely that at one point she lost consciousness. Bruises and cuts flecked her face.
>
> A deputy and a sergeant arrived at the house. Shell stayed inside. A deputy

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2015), http://www.timesfreepress.com/news/local/story/2015/oct/19/tangled-emotions-make-domestic-violence-cases/331236/ (last visited Jan. 24, 2016).

saw him through the window, Winslow said, holding a .59 caliber muzzleloader. Eight more officers came for backup. Some called out for Shell, but he remained inside for almost an hour.

Finally Shell walked onto the front porch, holding his rifle. Wilson said Shell lifted the gun in a "threatening manner," and officers fired, killing him. The Georgia Bureau of Investigation is reviewing the case.

A week after the shooting, Bloodworth stood on the same front porch. She pointed out bullet holes on the walkway to the house, on the front step to the porch, on the right side of the house, in a living room wall and in the bathtub. The splintered front door has been replaced.

Bloodworth, 47, said she doesn't remember what happened before the shooting that night because she suffered a concussion. She doesn't believe Shell attacked her, though. He was bigger than her. If he tried to hurt her, she figures, he would have killed her.

"He didn't hit me," she said.

"He didn't hit me," she said again.

"There's nothing."

This is the second time this year Bloodworth recanted on a domestic violence accusation against Shell. Experts say her reversals are common among victims and show the challenges of investigating and prosecuting cases like these. Often, the victim is the only witness. If that witness won't testify, convicting a batterer is difficult.

Victims recant for many reasons. They [are] (*sic*) love their abusers. They don't want to cause the person who hurt them to go to jail. They fear violent retribution for testifying, or believe the batterer's punishment won't be serious enough to protect them. Or they blame themselves, thinking they provoke the attacks.

Instead of a criminal conviction, ending with jail time and an attempt at rehabilitation, the relationship continues, often escalating to more severe violence or even death for the victim or attacker.

. . . .

The first incident between Bloodworth and Shell occurred March 28. A Walker County sheriff's investigator wrote in an incident report that he was called to Hutcheson Medical Center and found Bloodworth in the

emergency room, her right eye bloody and swollen shut. Doctors were stitching a cut that ran from Bloodworth's cheek, through her eyebrow, to the top of her nose.

She told the investigator Shell had been drinking and got angry when they argued about a video game. He smashed a beer can against her face.

. . .

Six months later, on Sept. 21, Bloodworth and Shell appeared in Walker County State Court. Bloodworth said she told Judge Billy Mullinax she wanted the case dropped. She said the version of events in the incident report is not accurate.

On that night, she said, Shell was on the front porch, arguing with a man on their lawn. Bloodworth said she was in the family room, about 10 feet behind Shell. She said her boyfriend tried to throw his beer can at the man on the lawn. Somehow, Shell flung the can behind him and it hit Bloodworth. She said Shell was sick about accidentally hurting her. Mullinax agreed to drop the case.

. . . .

> Bloodworth said she loved him from the time she met him, 10 years ago, when he built a porch for her grandmother. He was 6 feet, 4 inches tall, blonde, broad and tan. He was handy around the house but also shopped with her at estate sales and flea markets. They watched action movies at night and traveled to Daytona, Fla., every summer to walk on compact sand and watch NASCAR races.
>
> On Mother's Day, he planted two rosebushes for her.
>
> "He took care of me," she said. "He provided for me. He protected me. He stood up for me. I never met a man like him."
>
> On the night of the shooting, she said she sat on the side of the road at the end of the bloc. She couldn't see, didn't know what was happening.
>
> Then, she heard a series of gunshots, she remembers that sound, if nothing else.

Ms. Bloodworth's story above is hardly unusual, and illustrates the well-established pattern of abuse, reconciliation, and further abuse. Domestic abuse is unique in the ongoing emotional and physical connection between the victim and the abuser which may have extended over prolonged

periods of time. The ongoing relationship almost inevitably includes periods of harmony and affection, the memories of which can override the shock from the brief episodes of violence. *See* Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 Fordham Urb. L.J. 953, 953-56 (1999). The "intense psychological dynamics" often lead to a "cycle of violence" where periods of violence are followed by the so called "honeymoon phase" when the batterer calms down and engages in loving contrition to keep the partner he loves. *Id.* at 953-55. It is generally during this period of relief and re-establishment of domestic connections that prosecutions take place. *Id.* at 955. Reunited with their loved ones, victims are reluctant to dwell on the negative and refuse to testify against their abuser. *Id.* The honeymoon period ends with another episode of violence, followed again by reconciliation and harmony, interrupted by yet more violence. *Id.* This cycle, commonly referred to as "battered women syndrome," is unique to domestic abuse and accounts for the high rates of recidivism But inside this pattern, law enforcement often has to admit defeat because without the cooperation of the victim, there is frequently no case. In short, contrary to Petitioners' claims that small, questionable domestic incidents may be inflated to unfairly sweep individuals into the criminal justice system, the reality is that domestic violence is difficult to prosecute, and small incidents are but precursors to ones of greater violence.

Complicating the picture is the reality that the victim may not be able to leave the abusive domestic

relationship. Studies have shown that women who are more fearful of their partner are paradoxically less likely to leave an abusive relationship. *See, e.g.*, Jinseok Kim & Karen A. Gray, *Leave or Stay? Battered Women's Decision After Intimate Partner Violence*, 23 J. Interpersonal Violence 1465, 1465-85 (2008) (reviewing the literature on the subject and presenting the results of a new study). Victims are also deterred from leaving because of financial fears, lack of a support network, social and religious disapproval, and fear for the wellbeing of their children. *See, e.g.*, Ola W. Barnett, *Why Battered Women Do Not Leave, Part 2: External Inhibiting Factors—Social Support and Internal Inhibiting Factors*, 2 Trauma Violence & Abuse, 3, 3-8 (2001).

Nor has the crisis been substantially mitigated by mandatory arrest policies and no drop policies. Studies have shown that female victims are often concerned that involving the police carries its own risk. *See, e.g.*, Meghan A. Novisky & Robert Peralta, *When Women Tell: Intimate Partner Violence and the Factors Related to Police Notification*, 21 Violence Against Women 65, 66-69 (2015) (noting, for example, that "victims feared that they would be wrongfully identified as abusers"). Victims may not want to involve law enforcement in mandatory arrest situations as they are fearful about losing custody of children, losing housing benefits, and being further victimized by the perpetrator long after the criminal justice system has run its course. *Id.*

In sum, domestic violence is a chronic problem that defies easy definition or resolution because of the complicated family and social dynamic. The First

Circuit correctly recognized the unique nature of domestic violence, and reversing its decision will increase the dangers faced by victims and law enforcement officers reacting to abusive situations.

## V. The First Circuit's Interpretation is Consistent with Congressional Intent by Including Reckless Acts within the Ambit of "Misdemeanor Crime of Domestic Violence"

The First Circuit's opinion properly includes reckless acts within the scope of Section 922(g)(9) offenses in the context of domestic violence. The First Circuit recognized "context matters," and as "Section 921 (a)(33)(A) is a provision crafted in the unique context of domestic violence and it should be so interpreted." *United States v. Voisine*, 778 F.3d 176, 180 (1st Cir. 2015). Reversing the First Circuit would "frustrate Congress's manifest purpose" of prohibiting domestic abusers from possessing firearms. *See Hayes*, 555 U.S. at 427. Congress recognized, prior to the enactment of Section 922(g)(9), that existing federal laws "were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *Id.* at 426. Moreover, this Court has recognized that Section 922(g)(9) was enacted to close a "dangerous loophole" in federal felon-in-possession laws. *Id.*; *Johnson v. United States*, 559 U.S. 133, 152-53 (2010) (Alito, J., dissenting) ("Congress therefore enacted this provision to keep firearms out of the hands of such abusers.").

Legislative history supports this reading of the statutory language. 142 Cong. Rec. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) ("In my view, anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms."). The First Circuit's decision correctly captures Congressional intent and the repetitive nature of domestic violence. Petitioners do not dispute that domestic abuse involves an "ongoing cycle of behavior between intimate partners or family members that may escalate." Pet. Br. 25. Nor do Petitioners suggest that those convicted only of "reckless" acts of domestic violence will break the typical pattern of repeated escalating acts of violence. In short, those convicted of "reckless" domestic violence fall well within the ambit of Section 922(g)(9) because the legislature recognized that domestic violence is not restricted to a one-off incident by those who have "demonstrated that he or she poses an unacceptable risk" by attempting of threatening violence against a loved one. *See* 142 Cong. Rec. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg)

This Court has recognized that statutory definitions must be construed in light of the context to which they apply. *Johnson*, 559 U.S. at 139-140 (internal citations omitted) ("Ultimately context determines meaning and we do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense "). The Lautenberg Amendment specifically was designed to address the unique nature of domestic violence, which made it

distinct from other acts of violence. Cf. 142 Cong. Rec. S10377-78 (internal citations omitted) ("[V]iolent acts classified as 'misdemeanors' in a domestic context would often 'be considered felonies, if committed by strangers.'"). Refusing to consider the context and nature of violence defeats the congressional intent, and the First Circuit correctly relied on the unique context of domestic violence in reaching its decision.

Nor is the First Circuit's interpretation inconsistent with the common law definition of battery which traditionally encompassed reckless infliction of harm. *See* 2 Wayne R. LaFave, *Substantial Criminal Law* § 16.2(c)(2) (2d ed. 2003); *see also Commonwealth v. Hawkins*, 32 N.E. 862, 863 (Mass. 1893) (holding that reckless shooting qualifies as a battery because if the victim "had died from the pistol shot, the defendant . . . would have been guilty of manslaughter. As she survived the injury, the same principle now requires a conviction of assault and battery"), *see also* Model Penal Code § 211.1 cmt. n.62 (the "necessary intent to injure could be inferred from recklessness."). Here, the Congress has applied the common-law definition of misdemeanor battery to define the term "misdemeanor crime of domestic violence." *Castleman*, 134 S.Ct. at 1411 (internal citations omitted) ("[I]t makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction."). Thus, the logical conclusion is that Congress intended to include reckless battery within the ambit of the "use of force" requirement in a "misdemeanor crime of domestic violence."

## VI. Practical Considerations Require Affirmation of the First Circuit's Opinion.

Reversing the decision below would potentially exempt a substantial number of domestic abusers from the restrictions of Section 922(g)(9). Thirty-four states and District of Columbia define misdemeanor assault to include reckless causation of bodily injury. Resp't Br. 38. At the time Section 922(g)(9) was enacted, at least eight States had domestic violent assault provisions which included reckless conduct either expressly or by incorporating the State's general assault and battery provisions. *Id.* at 39. Since then, nine more States have added domestic assault and battery provisions that include recklessness. *Id.* Federal assault statutes also do not specify a required *mens rea*. *Id.* at 40. Adopting the Petitioners' interpretation would exclude categorical coverage of the majority of state misdemeanor battery statutes, state statutes specifically targeting domestic violence, as well as federal assault statutes from the ambit of Section 922(g)(9). *Id.* Such an interpretation would negate Congressional intent of keeping weapons out of the hands of domestic abusers. If the legislature had intended for a higher *mens rea* to apply, it could easily have adopted the required provisions. *See Voisine,* 778 F.3d at 181 (internal citations omitted) (noting that "'Congress expressly rejected' the § 16(a) definition, instead developing the term 'misdemeanor crime of violence' that was 'probably broader' than the definition" in §16"). The Congress did not intend to limit the provisions to a higher *mens rea*. Petitioners should

not be allowed to graft a higher standard than what the Congress intended.

Finally, upholding the First Circuit's decision would be consistent with *Castleman*. In *Castleman*, this Court recognized that "'[d]omestic violence' is not merely a type of 'violence,'" but rather a "term of art" that "encompasses a range of force broader than that which constitutes 'violence' *simpliciter*." *Castleman*, 134 S.Ct. at 1411 & n.4 This was precisely the rationale applied by First Circuit in reaching its conclusion that a *mens rea* of recklessness in domestic violence fell within the scope of Section 222(g)(9). *Voisine*, 778 F.3d at 781.

## CONCLUSION

This Court should affirm the judgment below.

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Respectfully submitted.

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